

*Riley (H. A.)*

WHO CAN BE MEDICAL EXPERTS?

BY

HENRY A. RILEY, Esq.,  
OF NEW YORK.



FROM

THE MEDICAL NEWS,

November 14, 1891.



## **WHO CAN BE MEDICAL EXPERTS?**

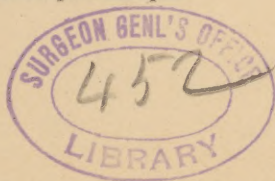
BY HENRY A. RILEY, ESQ.,  
OF NEW YORK.

---

THE importance of medical evidence is acknowledged by all writers on jurisprudence and by everyone who is conversant with the profound problems that often come before courts of justice for solution. The trustworthiness of much of the so-called expert evidence that is brought out, even in the most famous trials, is not, however, so apparent and so readily acknowledged.

There is no doubt that a strong prejudice exists among the members of the bar and the judges themselves against such evidence, and the public press frequently expresses the contempt which the common people have toward this kind of evidence. Even among physicians themselves it seems certain that there is great dissatisfaction with medical expert evidence as we see it exemplified to-day on the witness-stand.

Some of the adverse opinions expressed by judges are ill-considered and unjust in the extravagance of their condemnation; but the statement of Justice Grier of the United States Supreme Court is no doubt held by many others. He says: "Experience has shown that opposite opinions of persons pro-



fessing to be experts may be obtained to any amount; and it often occurs that not only many days, but even weeks, are consumed in cross-examinations to test the skill or knowledge of such witnesses and the correctness of their opinions, wasting the time and wearying the patience of both the Court and the jury, and perplexing instead of elucidating the question involved in the issue." Justice Stephen, whose recent retirement from the English Bench has deprived it of one of its most learned judges, gave utterance, in the celebrated trial of Mrs. Maybrick, to one of the severest criticisms of recent years. He even flippantly quoted the old saying which described a doctor as "a man who passed his time in putting drugs, of which he knew little, into a body, of which he knew less," and said that the fact that a learned man came into court and "swore to this, that, and the other, did not by any means give a reason for unqualified belief in what he said."

On the other hand, many judges have expressed their high opinion of the great help afforded courts and juries by the carefully considered and impartial statements of scientific experts, who have a thorough knowledge of the technical points involved, and no less an authority on evidence than Best has given his opinion as follows: "It would not be easy to overrate the value of the evidence given in many difficult and delicate inquiries, not only by medical men and physiologists, but by learned and experienced persons in various branches of science, art, and trade."

In fact, it would be impossible for juries to give

any intelligent verdict in many civil and criminal cases if it were not for the clear and convincing testimony of medical experts. Take, for instance, the recent trial of "Frenchy" in New York City for the murder of the woman called "Shakespeare," in which it would seem that medical expertism had shown a decided advance. In this case the conviction very largely hinged upon the chemical analysis of the contents of the woman's stomach and intestines, and the comparison with scrapings from the clothes and fingers of the accused man.

There is clearly no doubt that scientific witnesses will be required in the future, as in the past, for the elucidation of doubtful technical points, and it becomes a very important question to know who can be received as medical experts. Such persons have had a recognized position in the English witness-box for hundreds of years, and it was the eminent jurist Coke who pronounced the judgment, *Cuilibet in sua arte perito est credendum*. The propriety of this prohibition to all who are not skilled in their profession has been abundantly verified in the course of litigation since his time, and the ignoramus or the charlatan that ventures to air his opinions only brings disgrace on himself and his profession. Dr. Elwell, in his well-known work on *Malpractice, Medical Evidence, and Insanity*, says in regard to this matter: "While but little, comparatively, is expected of timid ignorance or weak and trembling inexperience, much, very much, is rightfully required and looked for from the learned and public man. If the former are able to command presence of mind and language sufficiently intelligi-



ble to be understood, it is as much or more than is expected of them. Not so, however, with the man of public and professional pretensions. He is measured properly by a different and more exact and rigid rule. If he fails to furnish good measure, he will most certainly leave the stand disgraced, and his friends chagrined and disappointed. There is no situation, perhaps, where the professional medical man can be placed wherein he will be subjected to a more thorough, rigid, and severe criticism as to what he says, how he says it, and the reason why he says it, with all the influences that may have a bearing on what he says, than as a medical witness in a court of justice, under the eagle eye of an able judge, the severe and interested scrutiny of counsel, and the candid and impartial observation of a jury. This is not only forcibly true as to the position of the medical witness, but is almost savagely so. On the one hand, the party by and for whom he is called seems to expect that he will say nothing that will damage him; that the weight of his character, professional reputation, position, influence—everything will all go to favor his interests; while, on the other hand, this very weight of character, influence, etc., will arouse the resisting energies of the opposite party to contradict, break down, and destroy the effect of such testimony. An important witness thus placed between two fires, as it were—a conspicuous mark as he is—will do well if he comes off without being badly wounded.”

The very title of expert seems to demand superior knowledge and a practical experience in his chosen profession, but courts have not always insisted on

the possession of both practical and theoretical knowledge as a preliminary to giving testimony. A person may make himself competent to testify as an expert who has gained a special knowledge of the particular subject under investigation by the reading and study of standard authorities, and not from experience and actual observation. The expert must be educated by the science of medicine, but his knowledge may have been obtained by study without practice, or by practice without study, if that is possible. In other words, unless there is a statute in the particular State to the contrary, the expert has only to make his knowledge evident, the source from which it was obtained not being material.

The rule has been broadly stated as follows: "It is not necessary that he should be a physician or have studied for one, nor be a graduate, nor one licensed to practice, nor need he have been a practitioner" (Rogers on *Law and Medical Men*, p. 111). This general rule has been somewhat modified by decisions in the various States. In Vermont (Fairchild *vs.* Bascomb, 35 Vt., 410) it has been held that mere education as a physician, without some practice as such, is insufficient to qualify one as an expert, and in Arkansas (Polk *vs.* State, 36 Ark., 117) competency must be shown both from study and experience. In New York (Roberts *vs.* Johnson, 58 N. Y., 613) a physician not in active practice at the time may give expert evidence, but this fact will tend to affect his credit. In general, it may be said that a person who has not become a physician by the ordinary methods of graduation

and licensure, or who, not being a physician at all, attempts to give expert evidence, will have little weight given to his testimony, even though he may gain admittance to the witness-stand. A person cannot qualify himself as an expert in a particular case merely by devoting himself to the study of authorities for the purposes of that case, when such reading and study is not in the line of his special calling or profession, and is entered upon to enable him to testify in the case.

An illustration of the rule that the expert need not be a physician is seen in a California case (*Re Toomes*, 54 Cal., 575), where a priest who had made a special study of physiology and psychology in order to be able to judge of the mental conditions of the communicants in his Church, and had experience daily in this way, was allowed to give an opinion of the mental state of a woman whom he had attended in her last illness.

The cases are rare, however, where a person who has not passed through a regular course of medical training is allowed to testify as a medical expert, and few lawyers would venture to place such a person on the stand, knowing what a merciless attack would be made upon him by the opposing counsel, should it appear that the so-called expert had not received the best instruction on the subject he claimed to give information about. So decided is this tendency toward requiring the most comprehensive knowledge on the part of the expert that specialists are usually called when a particular point in medical science is to be elucidated. This is not, however, a necessary requirement, as general practition-



ers are assumed to have sufficient knowledge to testify upon questions that are strictly and legitimately connected with their profession. Thus, one not an oculist can give an opinion in regard to injuries to the eye (*Castner vs. Sliker*, 33 N. J., 97), and one not an alienist can testify in regard to insanity (*State vs. Reddick*, 7 Kan., 143).

If the witness is not a specialist, however, his opinions will be received with less weight than if he were an acknowledged authority in the more limited branch of medical science. There are some decisions that trend in the opposite direction, but they are not numerous, and show that special circumstances served to sway the court. Thus, in Vermont, a physician who for more than thirty years has devoted his attention almost exclusively to the treatment of insane persons cannot be permitted, as an expert, to testify to the mental capacity of a person not previously insane, but in the last stages of disease (*Fairchild vs. Bascom*, 35 Vt., 398). In Massachusetts a physician who has not made the subject of insanity a special study, and who, when his patients require medical treatment for insanity, is in the habit of calling on a physician who makes insanity a specialty, or recommending the removal to an insane asylum, is not competent to give an opinion on a hypothetical case put to him (*Com. vs. Rich*, 4 Gray, 335, 337).

When the question of the possession of special knowledge sufficient to entitle a person to testify as an expert is under consideration, the standard of qualification required by the court will vary in different localities. Thus, in a case tried by a judge in a

country district distant from the large cities, the same high standard of special knowledge would not be required as in the cities of New York or Philadelphia. An interesting case involving this point was decided in Iowa over ten years ago, and merits quoting quite at length. In this case the defendant was charged with poisoning his wife by means of strychnine, and the judgment of the court was as follows: "Two physicians were called, and testified as to the tests applied in the chemical analysis made of the stomach of the deceased, and also of the tests usually applied for detecting the existence of poison in such cases. Both of them testified that they were practising physicians. One of them stated that he was not a professional chemist, but understood some of the practical details of chemistry—that portion at least which pertained to his profession—that he had no practical experience in the analysis of poisons until, in connection with Dr. Francis, he analyzed the contents of the stomach of the deceased; that since that time he had conducted experiments on a small scale; and that he was previously acquainted with the means of detecting poisons, and had since had some experience in that way. The other testified that he was not a practical chemist; that he did not follow the science as a profession; that he understood the chemical tests by which the presence of strychnine can be detected; that he professed to understand the principles of chemistry as laid down in the books on that science; that he never experimented with a view to detect strychnine by chemical tests; that he had seen experiments by professors of chemistry; and that there was one test much relied

on, the trial of which he had witnessed. Defendant objected to these witnesses as incompetent, and now urges that they did not show themselves possessed of the requisite professional skill.

"We think they were competent witnesses. It is, of course, desirable that great caution should be exercised in conducting experiments of this character, and that the most skilful professional aid should be secured. If conducted, however, by such as have not had experience, or by those who, though not practical chemists, give their opinions from knowledge derived from the books upon that science, such opinion would be entitled to less weight than if given by a practical chemist—he who bases his conclusions upon experience as well as books. The means of knowledge are proper to be considered by the jury, and they should give or withhold credence in the opinion given as they may believe the expert qualified to speak more or less intelligently and understandingly. But to say that none shall be permitted to give their opinions except those of the highest professional skill, or those who have given their lives to chemical experiments, would, in this country at least, render it impossible in most cases to find the requisite skill and ability."

In a case decided in Alabama (*Washington vs. Cole*, 6 Ala., 212), a physician stated in his deposition that he attended a negro "as a physician," and it was held that this was sufficient evidence that he was a physician to warrant the admission of his opinions in evidence regarding the disease of the negro.

An important point for consideration is how the question of the possession of sufficient knowledge to entitle a person to testify as an expert is to be decided.

This is a matter of fact to be decided by the judge, and not by the jury, and such decision will not be interfered with on appeal, except in a clear and strong case (*Lorg vs. First German Congregation*, 63 Pa. St., 156; *Hills vs. Home Ins. Co.*, 129 Mass., 544-551).

If the proposed expert is not able to establish the fact of special knowledge or skill, he will not be allowed to testify, and the court may personally examine such witness in order to ascertain his qualifications, or may hear evidence on the point (*Lester vs. Pittsford*, 7 Vt., 161; *Boardman vs. Woodman*, 47 N. H., 121; *Davis vs. State*, 35 Ind., 496).

In one case in Indiana (*Forgery vs. First Nat. Bank*, 66 Ind., 123-125) the Supreme Court said: "We find no test laid down by which we can determine with mathematical precision just how much experience a witness must have had, how expert, in short, he must be, to render him competent to testify as an expert."

The court must exercise a fair discretion in deciding on the qualifications of an expert, and from such a decision there is no appeal.

The courts do not allow the point that an expert belongs to a particular school or system of medicine to have weight in deciding his right to testify. The law does not recognize any single class of practitioners as alone entitled to be called "physicians," but all are equal (*Corsi vs. Maretzek*, 4 E. D. Smith, 1).





# THE MEDICAL NEWS.

*A National Weekly Medical Periodical, containing 24-28 Double-Columned Quarto Pages of Reading Matter in Each Issue. \$4.00 per annum, post-paid.*

That THE NEWS fulfils the wants of men in active practice is made clear by the steady growth of its subscription list. This increase of readers has rendered possible a reduction in the price of THE NEWS to **\$4.00** per year, so that it is now by far the cheapest as well as the best large weekly journal published in America.

Every mode of conveying serviceable information is utilized. The foremost writers, teachers and practitioners of the day furnish original articles, clinical lectures and notes on practical advances; the latest methods in leading hospitals are promptly reported; a condensed summary of progress is gleaned each week from a large exchange list, comprising the best journals at home and abroad; a special department is assigned to abstracts requiring full treatment for proper presentation; editorial articles are secured from writers able to deal instructively with questions of the day; books are carefully reviewed; society proceedings are represented by the pith alone; regular correspondence is furnished by gentlemen in position to know all occurrences of importance in the district surrounding important medical centres, and minor matters of interest are grouped each week under news items. Everything is presented with such brevity as is compatible with clearness, and in the most attractive manner. In a word, THE MEDICAL NEWS is a crisp, fresh, weekly newspaper, and as such occupies a well-marked sphere of usefulness, distinct and complementary to the ideal monthly magazine, THE AMERICAN JOURNAL OF THE MEDICAL SCIENCES.

---

## The American Journal of the Medical Sciences.

*Published monthly. Each number contains 112 octavo pages, illustrated. \$4.00 per annum, post-paid.*

In his contribution to *A Century of American Medicine*, published in 1876, Dr. John S. Billings, U. S. A., Librarian of the National Medical Library, Washington, thus graphically outlines the character and services of THE AMERICAN JOURNAL: "The ninety-seven volumes of this Journal need no eulogy. They contain many original papers of the highest value; nearly all the real criticisms and reviews which we possess; and such carefully prepared summaries of the progress of medical science, and abstracts and notices of foreign works, that from this file alone, were all other productions of the press for the last fifty years destroyed, it would be possible to reproduce the great majority of the real contributions of the world to medical science during that period."

---

### COMMUTATION RATE.—Postage paid.

THE MEDICAL NEWS, published every Saturday,	} in advance, \$7.50.
THE AMERICAN JOURNAL OF THE MEDICAL	
SCIENCES, monthly, . . . . .	

---

**LEA BROTHERS & CO., 706 and 708 Sansom St., Phila.**